IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERALD WAYNE DAVENPORT, JR., Appellant.	No. 38611-9-II UNPUBLISHED OPINION

Van Deren, C.J. — Jerald Davenport appeals the sentencing court's ruling that his 1992 Oregon second degree robbery conviction is comparable to Washington's second degree robbery conviction as a "most serious offense" under the persistent offender accountability act (POAA).[1] Finding no error, we affirm.

FACTS

Davenport was convicted of two counts of first degree robbery and sentenced to life without possibility of parole under the POAA. The trial court considered two convictions in determining whether Davenport should be sentenced as a persistent offender: (1) an Oregon conviction for second degree robbery that the trial court found to be comparable to second degree

[1] Chapter 9.94A RCW.

robbery under Washington law and (2) a Washington conviction for second degree robbery. Davenport appealed. *State v. Davenport*, 140 Wn. App. 925, 928, 167 P.3d 1221 (2007), *review denied*, 163 Wn.2d 1041 (2008). We affirmed, rejecting Davenport's arguments on sufficiency of evidence and ineffective assistance of counsel. *Davenport*, 140 Wn. App. at 928. Our Supreme Court granted Davenport's petition for review and remanded for reconsideration in light of *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005). *Davenport*, 140 Wn. App. at 928. On reconsideration, we affirmed the conviction on count I, first degree robbery; reversed the conviction on count II, first degree robbery; and remanded to the trial court to dismiss count II with prejudice—due to insufficient evidence—and for resentencing. On remand, the trial court amended the original judgment and sentence to vacate the sentence on the second of the first degree robbery convictions and recalculated the offender score and standard range on one conviction for first degree robbery.

Davenport filed a direct appeal and personal restraint petition, arguing that he had a right to be present at his resentencing hearing. *Davenport*, 140 Wn. App. at 932-33. We agreed with Davenport and "reverse[d] and remand[ed] to the trial court for a resentencing hearing at which Davenport ha[d] the right to be present should he wish to exercise it." Clerk's Papers (CP) at 119.

At resentencing, the trial court permitted Davenport to challenge the comparability of his 1992 Oregon conviction for robbery in the second degree to the Washington crime of robbery in the second degree. The trial court ruled that the two crimes were comparable and, therefore, Davenport's current first degree robbery conviction constituted his third strike under the POAA. Davenport appeals the sentencing court's ruling on comparability of the Oregon second degree

robbery conviction with Washington's second degree robbery statute.

ANALYSIS

Davenport argues that the sentencing court erred in ruling that his 1992 second degree robbery conviction in Oregon is a "strike" under the POAA because the Oregon conviction is neither legally nor factually comparable to second degree robbery in Washington. Davenport presents three arguments against legal comparability, all of which ultimately fail.

A. Standard of Review

We review de novo a sentencing court's decision to consider a prior conviction as a strike. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

B. Legal Comparability

Under the POAA, a defendant already convicted of two "most serious offenses" must be sentenced to life without parole upon conviction for a third such offense. Former RCW 9.94A.030(29)(a)(ii) (1999); former RCW 9.94A.120(4) (2000). Second degree robbery is a most serious offense or "strike" for purposes of the POAA. Former RCW 9.94A.030(25)(o). Foreign convictions constitute strikes if they are comparable to Washington's most serious offenses. Former RCW 9.94A.030(25)(u); *see also In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 252, 111 P.3d 837 (2005).

The trial court must employ a two part test to determine the comparability of a foreign offense. *Thiefault*, 160 Wn.2d at 415. Under this test, a foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. *Lavery*, 154 Wn.2d 249 at 255-58. First, the trial court must decide whether the foreign offense is legally comparable. A foreign offense is legally comparable "if the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wn.2d at 415. The relevant

Washington statute is the one in effect at the time defendant committed the foreign crime. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then determine whether the offense is factually comparable. *Morley*, 134 Wn.2d at 606.

Here, we compare the versions of the Oregon second degree robbery statute[2] and the Washington second degree robbery statute[3] that were in effect in 1992, when Davenport committed the Oregon offense. *See Morley*, 134 Wn.2d at 606. The State relies solely on *State*

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[2] Former Oregon Revised Statute (ORS) 164.395(1) (1971) provides:

> A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft the person uses or threatens the immediate use of physical force upon another person with the intent of:
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> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
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> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft.

ORS 164.405(1) provides:

> A person commits the crime of robbery in the second degree if the person [commits third degree robbery under] ORS 164.395 and the person:
>
> (a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or
>
> (b) Is aided by another person actually present.

[3] RCW 9A.56.210(1) provides: "A person is guilty of robbery in the second degree if he commits robbery." RCW 9A.56.190 provides:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

v. McIntyre, 112 Wn. App. 478, 481, 49 P.3d 151 (2002), in which we held that an Oregon third degree robbery conviction is legally comparable to a Washington second degree robbery conviction because "[b]oth statutes require (a) a theft; (b) the use or threatened use of immediate force or fear of injury; and [that] the force or fear be used to obtain or retain the property." The sentencing court also relied on *McIntyre* and stated that "[s]ince the Oregon Robbery II statute incorporates the elements of Oregon's Robbery III, and then adds elements to elevate the crime, it follows that Oregon's Robbery II must also be comparable to Washington's Robbery II offense." CP at 18-19.

We agree with the sentencing court that *McIntyre* supports its conclusion that Oregon's second degree robbery statute is comparable to Washington's second degree robbery statute because it incorporates the elements of Oregon's third degree robbery statute, which satisfy the elements of Washington's second degree robbery statute. Nevertheless, we briefly analyze the two additional elements that elevate the Oregon crime from third degree robbery to second degree robbery: "the person: (a) [r]epresents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or (b) [i]s aided by another person actually present." Oregon Revised Statute (ORS) 164.405(1). These additional elements do not appear in Washington's second degree robbery statutes but Washington courts use nonstatutory elements when conducting legal comparability analyses.[4] RCW 9A.56.190; RCW 9A.56.210(1).

[4] In *Lavery*, our Supreme Court considered the Washington statute's nonstatutory robbery element of specific intent to steal in holding that the statute was narrower than the federal bank robbery statute, which defines a general intent crime. 154 Wn.2d at 255-56. In *State v. Howe*, 151 Wn. App. 338, 212 P.3d 565 (2009), we held that a California statute is broader than its Washington counterpart because we had previously interpreted the statutory language of "'any touching of the sexual or other intimate parts of a person'" to require touching be "'directed to protecting the parts of the body in close proximity to the primary erogenous areas which a reasonable person could deem private with respect to salacious touching by another.'" 151 Wn.

Both of Oregon's additional statutory second degree robbery elements are nonstatutory elements of second degree robbery in Washington. First, even though Washington makes no explicit distinction between degrees based on a representation element as does ORS 164.405(1)(a), Washington courts have implied such an element in holding that a defendant committed second degree robbery. *In re Pers. Restraint of Bratz*, 101 Wn. App. 662, 676, 5 P.3d 759 (2000) ("[M]ere threatened use of a deadly weapon in the commission of a robbery, unaccompanied by any physical manifestation indicating a weapon, is second degree robbery, not first."); *see State v. Jennings*, 111 Wn. App. 54, 62 n.5, 44 P.3d 1 (2002). Second, even though the Washington robbery statute makes no mention of accomplice liability, as does ORS 164.405(1)(b), such liability is implied in Washington because the "scope of potential accomplice liability in Washington is broad," 13B Douglas J. Ende, Washington Practice: Criminal Law § 2309, 10 (2009-10), and "an information which charges an accused as a principal adequately apprises him or her of potential accomplice liability." *State v. Rodriguez*, 78 Wn. App. 769, 774, 898 P.2d 871 (1995).

Accordingly, we hold that the Oregon and Washington second degree robbery statutes are legally comparable and Davenport's claim fails. Because the Oregon crime does not contain

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App. 345 n.7 (emphasis omitted) (quoting RCW 9A.44.010(2)), 346 (quoting *In re Welfare of Adams*, 24 Wn. App. 517, 521, 601 P.2d 995 (1979)). In *State v. Russell*, 104 Wn. App. 422, 445, 16 P.3d 664 (2001), we held that an Arizona robbery statute is legally comparable to its Washington counterpart because "Arizona courts, like Washington's, require proof of [the nonstatutory element of] intent to deprive the victim."

alternative elements not found in Washington, "our inquiry ends[5] without examining the proven facts from the out-of-state record." *McIntyre*, 112 Wn. App. at 483.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur:

Van Deren, C. J.

Houghton, J.

Quinn-Brintnall, J.

[5] Davenport, in the interest of preserving his challenge to settled law regarding whether the trial court or a jury determines the fact of a prior conviction, briefly argues that the sentencing court violated his Sixth Amendment right to a jury trial when the trial court rather than a jury determined that he had a prior conviction, thereby raising his sentence beyond the statutory maximum. Davenport does not challenge the identity of the person the State alleges committed the second degree robbery in Oregon or that the crime actually occurred. He merely states that he "raises the issue in order to preserve it." Br. of Appellant at 11. The State points to settled law stating that neither the federal nor state constitution requires a jury to determine a prior conviction; thus, it reasons, the sentencing court did not err.

We review an alleged sentencing error under *Blakely v. Washington*, 542 U.S. 296, 304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), for structural error, which requires automatic reversal. *State v. Curtis*, 126 Wn. App. 459, 465, 108 P.3d 1233 (2005); *State v. Fero*, 125 Wn. App. 84, 99-100, 104 P.3d 49 (2005). Except for a prior conviction, a "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In applying *Apprendi*, Washington courts have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. *Lavery*, 154 Wn.2d at 256. We hold that the sentencing court did not violate Davenport's Sixth Amendment rights, thus, Davenport's claim fails under existing law.